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PROCEEDINGS AND ORDERS

DATE: 050385

CASE NBR 84-1-01062 CFX
SHORT TITLE Gee, Nancy H.
VERSUS Boyd, Claude D., et al.

DOCKETED: Dec 28 1984

Date	Proceedings and Orders
Dec 28 1984	Petition for writ of certiorari filed.
Jan 15 1985	Order extending time to file response to petition until March 1, 1985.
Jan 24 1985	Order extending time to file response to petition until March 1, 1985.
Jan 24 1985	The above extension applies to ALL RESPONDENTS.
Feb 28 1985	Order further extending time to file response to petition until March 31, 1985.
Feb 28 1985	Above extension is for the Solicitor General.
Mar 13 1985	Brief of respondent Col. Claude D. Boyd, III, in opposition filed.
Mar 20 1985	DISTRIBUTED. April 12, 1985
Mar 22 1985	Reply brief of petitioner Nancy H. Gee filed.
Apr 15 1985	REDISTRIBUTED. April 19, 1985
Apr 22 1985	Petition DENIED. Dissenting opinion by Justice White

CONTINUE {

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Date	Proceedings and Orders
Apr 22 1985	Petition DENIED. Dissenting opinion by Justice White with whom Justice Brennan and Justice Marshall join. (Detached opinion.)

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1422

84-1062

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NANCY H. GEE,

Petitioner,

v.

COLONEL CLAUDE D. BOYD, III, in his official capacity as District Engineer of the Norfolk District of the Corps of Engineers of the United States Department of the Army; and CITY OF NORFOLK, VIRGINIA; and LOWER CHESAPEAKE ASSOCIATES, a Virginia general partnership; and McCLANAHAN INGLES, WILLIAM B. ELLEN, ARTHUR J. McQUILLAN, JOHN F. YAMNITZ, Partners; and WILLOUGHBY HARBOR, LTD., a Virginia Corporation.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Did the Court of Appeals err in holding that an environmental impact statement was not required before a permit was issued by the Corps of Engineers for a 298-slip marina project where the Corps had found that the project would have significant impacts on the aquatic environment, recreation, socioeconomics and land use?

Did the Court of Appeals err in holding that the evaluation of alternatives by the Corps of Engineers satisfied the requirements of the National Environmental Policy Act absent consideration of a scaled-down project?

Did the Court of Appeals err in

holding that the Corps of Engineers was not required to verify data concerning the project's financial feasibility which was submitted by a permit applicant and used in the Environmental Assessment?

LIST OF PARTIES

PETITIONER: Nancy H. Gee

RESPONDENTS: Colonel Claude D. Boyd, III,*/ in his official capacity as District Engineer of the Norfolk District of the Corps of Engineers of the United States Department of the Army.

City of Norfolk, Virginia

Lower Chesapeake Associates, a Virginia general partnership, McClanahan Ingles, William B. Ellen, Arthur J. McQuillan, John F. Yamnitz, Partners.

Willoughby Harbor, Ltd., a Virginia Corporation.

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*/ This action was initially brought against Colonel Ronald E. Hudson in his official capacity as District Engineer of the Norfolk District of the Corps of Engineers of the United States Department of the Army. Colonel Hudson has ceased to hold this office. Colonel Boyd, his successor, has been substituted in his official capacity pursuant to Rule 40.3 of this Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No.

NANCY H. GEE,

Petitioner,

v.

COLONEL CLAUDE D. BOYD, III, in his official capacity as District Engineer of the Norfolk District of the Corps of Engineers of the United States Department of the Army; and CITY OF NORFOLK, VIRGINIA; and LOWER CHESAPEAKE ASSOCIATES, a Virginia general partnership; and McCLANAHAN INGLES, WILLIAM B. ELLEN, ARTHUR J. McQUILLAN, JOHN F. YAMNITZ, Partners; and WILLOUGHBY HARBOR, LTD., a Virginia Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE FOURTH CIRCUIT

OPINION BELOW

The petitioner, Nancy H. Gee, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 3, 1984. The opinion of the Court of Appeals below (Appendix A, infra, p. 1a) is not reported. The opinion of the District Court below (Appendix B, infra, p. 19a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 3, 1984. This petition for a writ of certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are:

Administrative Procedure Act
5 U.S.C. §706

28 U.S.C. §1254(1)
28 U.S.C. §1331
28 U.S.C. §2201
28 U.S.C. §2202
33 U.S.C. §403
33 U.S.C. §1344

National Environmental Policy Act
42 U.S.C. §4332

33 C.F.R. Part 230, Appendix B
40 C.F.R. §1502.14
40 C.F.R. §1506.5(b)
40 C.F.R. §1508.8
40 C.F.R. §1508.14(b)
40 C.F.R. §1508.20
40 C.F.R. §1508.27

They are reproduced at pages 52a - 60a of Appendix C.

STATEMENT OF THE CASE

Factual Background

In July, 1982, Willoughby Harbor, Ltd., acting as agent for the City of Norfolk, Virginia ("City"), applied to

the Norfolk District of the Army Corps of Engineers ("Corps") for a permit to construct a 298-slip marina on Willoughby Bay in the City. The project site is an abandoned ferry landing, which had been acquired by the City from the Virginia Department of Highways and Transportation. The project entails dredging and filling, as well as the placement of structures in navigable waters. As a consequence, Corps' approval was necessary under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403, and Section 404 of the Clean Water Act, 33 U.S.C. §1344.

The application proposed a project which involves maintenance construction of 475 linear feet of bulkhead, construction of approximately 480 feet of riprap revetment, 2316 linear feet of open-pile timber piers, and other structures

including 900 feet of breakwater. In addition, the application indicated that 40,000 cubic yards of sandy loam, silt and mud would have to be dredged at the site, with 17,000 cubic yards to be used as fill behind the proposed revetment and bulkhead. The remaining 23,000 cubic yards are to be deposited elsewhere in Hampton Roads, Virginia. The cost of the project was projected at $1.7 million.

The permit application stated:

> Just as minimum parking space requirements were considered, the total number of slips for the proposed development was carefully studied and weighed with total economic feasibility.

The applicant noted that only a year earlier, another group of investors had considered a 238-slip marina with 115 parking places, but concluded that such a project would generate annual losses of $24,000 or more. That led the applicant

to request approval of a larger marina to make the project financially feasible.

Critical to the applicant's projections that more than 256 slips were required to make the venture profitable was its assumption that the annual financing rate for a 15-year period would be 18%. More slips meant more filling. This led the applicant to conclude: "Filling of the adjacent intertidal and subaqueous areas is necessary in order to achieve an economically viable project...."

The Final Environmental Assessment contains the following discussion:

> Studies indicate that there is a tremendous shortage of marina slips in the Tidewater area. Existing facilities are at 100% capacity with long waiting lists for slips.
>
> In addition, economic feasibility studies indicate that the proposal would require approximately 260 slips in order for the proposal to be economically feasible. Existing upland is being fully utilized but the need exists for additional parking spaces. This need can only be met by expanding the facility into the waterway.

The only "economic feasibility study" in the record is a brief one-and-a-half page discussion in the application to justify the amount of fill associated with the project. No effort was made by the Corps to determine the basis for the 18% financing rate assumption used in the applicant's analysis. The actual interest obtained was 10.1% per year.

Neither the applicant nor the Corps conducted a survey of the demand for marina slips in the area. Indeed, the only record references to demand are in the form of conclusory statements. Correspondence from the applicant to the Corps stated that "the occupancy at both public and private marinas in Norfolk was at 100% and that all facilities had long

waiting lists." The application itself referred only to a "tremendous" need for slips. The demand is never quantified.

By a series of agreements executed before the permit application was submitted, the City had given Willoughby Harbor, Ltd. the right to develop the site as a marina and had agreed to convey title to the property to Lower Chesapeake Associates, an affiliate of Willoughby Harbor, Ltd. The project is to be financed by industrial revenue bonds issued by the Industrial Development Authority of the City of Norfolk in December 1982 at a 10.1% annual interest rate.

Public notice of the permit application was issued on August 18, 1982, followed by a public comment period. No notice, however, was sent to the petitioner, Nancy H. Gee, who resides on

property adjacent to the project. At a processing meeting on September 10, 1982, the Corps indicated its preliminary approval of the permit application.

Several agencies expressed concerns about the proposed marina. The U.S. Environmental Protecton Agency questioned the unmitigated loss of almost an acre of aquatic habitat for a non-water dependent parking area, saying that "we do not wish to set dangerous (and unwarranted) precedent by allowing open water filling...." The National Marine Fisheries Service called the proposed project "undesirable" and opined that the fill for parking would be "a dangerous precedent." The Virginia Institute of Marine Science commented that arranging off-site parking instead of filling for that purpose would be preferable to the loss of marine habitat, noting that "shallow subtidal areas

such as that proposed to be filled are limited in extent and valuable as feeding/foraging areas for marine organisms including many of sport and commercial value...."

The Corps issued its Preliminary Environmental Assessment ("PEA") on September 27, 1982. The District Court described that document as follows:

> The EA found that the Norfolk/Virginia Beach area has an acute shortage of marina slips. Relying upon economic feasibility studies which indicated that the proposed marina would need at least 260 slips to be profitable, the report found that the demand for parking facilities for such a marina could only be met by expanding into the waterway. The EA recognized that the project would have a significant impact upon the aquatic environment, but concluded that socioeconomic benefits outweighed the environmental concerns.

On December 10, 1982, the District

Engineer issued his Final Environmental Assessment ("FEA"), Finding of No Significant Impact, Final Evaluation of 404(b)(1) Guidelines and Statement of Findings. He concluded that the project would have significant impacts on recreation, land use, socioeconomics, general environmental concerns, and fish and wildlife. The District Engineer found, nevertheless, that the proposed marina project would have no significant impact on the quality of the human environment and declined to prepare an EIS.

No discussion of alternatives appears in the FEA. The only references to alternatives in these final documents are in the Statement of Findings and two footnotes in the Final Evaluation of 404(b)(1) Guidelines. The Statement of Findings concludes:

> As outlined in my Final Environmental Assessment, the

> socioeconomic effects and recreation benefits of the proposal outweigh the environmental impacts in the absence of practicable alternative construction sequences and locations.

The footnotes from the Final Evaluation of 404(b)(1) Guidelines are:

> The no-build alternative would have to be considered the least environmentally damaging alternative, since no alternatives exist for parking and the project would have to be scrapped. The no-build alternative fails to meet the pressing need for marina spaces. Here, the socioeconomic need for the project outweighs the environmental detriment.
>
> ***
>
> All practicable steps have been taken [to minimize adverse impacts as required by 40 CFR §§230.70 through 230.77], short of the no-build option.

The Corps permit was issued effective January 5, 1983. The City of Norfolk then formally requested that the permit be assigned to Lower Chesapeake

Associates.

The petitioner learned of the Corps' action in early 1983, after the permit was issued. Writing to the District Engineer on January 21, 1983, she complained about the absence of notice and objected to the proposed marina. The District Engineer provided her with an opportunity to offer her comments and held the assignment to Lower Chesapeake Associates in abeyance pending his review of her objections. He declined, however, to prepare an EIS.

The petitioner submitted extensive comments, including those of three experts retained by her, regarding the likely environmental impacts of the proposed project and the need for an environmental impact statement. In addition, forty-seven property owners in the Willoughby area submitted petitions to

the District Engineer objecting to the project.

Petitioner's husband submitted comments demonstrating that the 18% interest rate assumption used by the applicant was not supportable. He urged the District Engineer to examine a more realistic interest rate for an industrial revenue bond, arguing that this would reduce the break-even point for profitability to approximately 165 slips.

On May 12, 1983, the District Engineer notified the petitioner that he would not revoke or suspend the permit. It was subsequently assigned to Lower Chesapeake Associates.

The Proceedings Below

This action commenced on August 5, 1983. The complaint charged, inter alia: (1) that the Corps unlawfully failed to

prepare an EIS; (2) that reasonable alternatives and mitigation measures were not adequately considered; and (3) that the Corps failed to verify the accuracy of certain financial data submitted by the applicant. Jurisdiction is based on 28 U.S.C. §§1331, 2201 and 2202.

Respondents moved for summary judgment on the basis of the administrative record as certified by the District Engineer. The petitioner filed her cross-motion for summary judgment based on the certified administrative record and several documents obtained from the private developers during pretrial discovery. Those documents demonstrated that the developers had assumed substantially lower interest rates for project financing than the 18% figure presented to the Corps in the application for the permit.

On February 15, 1984, the District Court granted respondents' motions for summary judgment and denied petitioner's cross-motion for summary judgment. Petitioner noted an appeal on February 17, 1984 and moved for an injunction pending appeal, which was denied by the District Court at a February 21, 1984 hearing. An application to a circuit judge for an injunction pending appeal was denied on February 23, 1984.

The appeal was expedited by the Court of Appeals on petitioner's motion and over the objections of the private respondents (Lower Chesapeake Associates and Willoughby Harbor, Ltd.). A decision affirming the District Court was published on October 3, 1984.

Respondents suggested to the Court of Appeals that the case had become moot because dredging and filling had been

substantially completed, citing Richland Park Homeowners Ass'n, Inc. v. Pierce, 671 F.2d 935 (5th Cir. 1982); Friends of the Earth, Inc. v. Bergland, 576 F.2d 1377 (9th Cir. 1978); Ogunquit Village Corp. v. Davis, 553 F.2d 243 (1st Cir. 1977). See also Florida Wildlife Federation v. Goldschmidt, 611 F.2d 547, 549 (5th Cir. 1980). Petitioner noted that each of those cases was distinguishable because challengers in each, unlike the petitioner here, had failed to seek timely stays to stop construction. The petitioner relied on Defenders of Wildlife v. Endangered Species Scientific Authority, 659 F.2d 168, 175 (D.C. Cir. 1981), cert. den., 454 U.S. 963 (1982) and Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 591 n.1 (9th Cir. 1981).

The petitioner also contended that

her controversy with the Corps fell into the "capable of repetition, yet evading review" category of cases because dredge and fill projects to the other side of her residence and elsewhere in the immediate Willoughby area were probable. See Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). She might never be able to obtain final disposition of her complaint challenging such projects before they were substantially underway or completed.

Dredge and fill projects are also subject to restoration. See, e.g., United States v. Joseph G. Moretti, Inc., 526 F.2d 1306 (5th Cir. 1976). The fact that it remains possible to grant the relief requested (without regard to whether it would be appropriate to do so) precludes mootness.

REASONS FOR GRANTING THE WRIT

1. This case provides an opportunity for the Court to resolve a longstanding conflict among the circuits over the appropriate review standard to be applied in determining whether a federal official's decision not to prepare an environmental impact statement violates NEPA.

Section 102(2)(C) of the NEPA, 42 U.S.C. §4332(2)(C), requires that an environmental impact statement be prepared for every major federal action significantly affecting the quality of the human environment. Respondents concede that the permit issuance here is a major federal action. The remaining issue is whether it is likely to have a significant impact on the quality of the human environment.

At least two different tests are now being applied by lower federal courts to findings of no significant impact. Several circuits apply the standard of arbitrariness, while others employ the standard of reasonableness. Arguably, a third standard is used in the District of Columbia. In this case, the Court of Appeals applied the standard of arbitrariness in reviewing the District Engineer's decision not to prepare an EIS.

This Court has addressed issues relating to NEPA's threshold requirements on only three occasions. The opinions in those cases did not reach the precise question presented here and, therefore, provide no clear guidance to lower courts.

The first of those cases was Flint Ridge Development Co. v. Scenic Rivers Association, 426 U.S. 776 (1976), which

held that NEPA's EIS requirement does not apply to decisions by the Secretary of Housing and Urban Development that must be made within a statutorily-prescribed 30-day period. The second case was Kleppe v. Sierra Club, 427 U.S. 390 (1976), which held that a regional programmatic EIS need not be prepared until a report regarding a regional proposal is actually made. The third case was Andrus v. Sierra Club, 442 U.S. 347 (1979), which held that an EIS need not be prepared by a federal agency before submitting appropriations requests to Congress.

Kleppe noted that the lower court had "erred in both its factual assumptions and its interpretation of NEPA." 427 U.S. at 403. In that case, however, those challenging the agency's failure to prepare an EIS conceded that

"to prevail they must show that petitioners have acted arbitrarily in refusing the prepare one comprehensive statement on this entire region, and we agree." Id. at 412. The agency's determination that the interrelationship of environmental impacts was not regionwide was a determination assigned to the agency's "special competency." Id. at 414.

The Court has plainly announced that NEPA imposes on federal agencies a duty to take a "hard look" at environmental considerations. Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980); Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978); Kleppe v. Sierra Club, supra, 427 U.S. at 410 n.21; Aberdeen & Rockfish Ry. Co. v. SCRAP, 422 U.S. 289 (1975). This "hard

look" doctrine would appear to require a less deferential standard than the traditional arbitrary and capricious test..

Conflicts over the review standard for threshold determinations arose as the first NEPA cases began to make their way through the courts. See Anderson, "The National Environmental Policy Act," in E. L. Dolgin and T. G. P. Guilbert (ed.), Federal Environmental Law (1974), pp. 356-362. More than a decade without a resolution of the conflict by this Court has led to a confusing maze of decisions on the subject.1/

1/ See Haug, "Determining the Significance of Environmental Issues Under the National Environmental Policy Act," 18 J. Envtl. Mgmt. 15 (1984); McGarity, "The Courts, the Agencies and NEPA Threshold Issues," 55 Texas L. Rev. 801 (1977); Shea, "The Judicial Standard for Review of Environmental Impact Statement Threshold Decisions," 9 B.C. Envtl. Aff. L. Rev. 63 (1980).

The First Circuit has ruled that a decision not to prepare an EIS is reviewed under the arbitrary and capricious test. Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1980). See also Quinonez-Lopez v. Coco Lagoon Development Corp., 733 F.2d 1, 2 (1st Cir. 1984) (noting that, in essence, challenger must show that agency decision is unreasonable).

In Hanly v. Kleindienst (Hanly II), 471 F.2d 823, 828-29 (1973), cert. den., 412 U.S. 908 (1973), the Second Circuit applied the arbitrary and capricious standard to a threshold determination under §102(2)(C) not to prepare an EIS. See also Town of Orangetown v. Gorsuch, 718 F.2d 29, 35 (1983), cert. den., 104 S.Ct. 1592 (1984); City of New York v. U.S. Department of Transportation, 715 F.2d 732, 748 (1983); City of Rochester

v. U.S. Postal Service, 541 F.2d 967, 973 (1976)("reasoned elaboration" required); Note, "The Second Circuit Creates New Substantive and Procedural Guidelines to Aid Agencies in Making Threshold Determinations of the Need for an Impact Statement," 51 Texas L. Rev. 1016 (1973).

The Third Circuit has applied the standard of reasonableness in approving a negative determination, but has reserved judgment on whether reasonableness or the somewhat less stringent test of arbitrariness is the appropriate standard in all cases. Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732, 741-42 (1982).

In recent years, the Fourth Circuit has applied the arbitrary and capricious test to decisions not to prepare an EIS. Webb v. Gorsuch, 699 F.2d 157, 159 (1983); Providence Road Community Ass'n

v. Environmental Protection Agency, 683 F.2d 80, 82 (1982). In his opinion for the Court in Ely v. Velde, 451 F.2d 1130, 1138 (1971), Judge Sobeloff observed that an agency must fully explicate its course of inquiry, its analysis and its reasoning in declining to prepare an EIS.

The standard of reasonableness is applied by the Fifth Circuit to threshold determinations. See, e.g., Vieux Carre Property Owners, Residents and Associates, Inc. v. Pierce, 719 F.2d 1272 (5th Cir. 1983); Environmental Defense Fund, Inc. v. Marsh, 651 F.2d 983, 992 (1981); Sierra Club v. Hassell, 636 F.2d 1095 (1981); Image of Greater San Antonio v. Brown, 570 F.2d 517 (1978); Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (1973).

The Sixth Circuit requires a "reasoned determination" to support a

failure to prepare an EIS, but has declined to choose between the standard of arbitrariness and that of reasonableness. Boles v. Onton Dock, Inc., 659 F.2d 74, 75 (1981). The opinion in Boles appears to incline toward the latter test. See also Breckenridge v. Rumsfeld, 537 F.2d 864, 866 (6th Cir. 1976), cert. den., 429 U.S. 1061 (1977).

In the Seventh Circuit, the standard of arbitrariness is applied. Nucleus of Chicago Homeowners Association v. Lynn, 524 F.2d 225, 229 (1975), cert. den., 424 U.S. 967 (1976); First National Bank of Chicago v. Richardson, 484 F.2d 1369, 1381 (1973).

The test in the Eighth Circuit is whether the decision not to prepare an EIS was reasonable under the circumstances. See, e.g., Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 271

(1980), cert. den., 449 U.S. 836; Robinson v. Knebel, 550 F.2d 422, 423, 427 (1977); Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1320 (1974).

The Ninth Circuit has repeatedly articulated a standard of reasonableness in judging whether a finding of no significant impact on the human environment is in violation of §102(2)(C) of NEPA. Foundation for North American Wild Sheep v. Department of Agriculture, 681 F.2d 1172, 1178 (1982); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 860 (1982); Portela v. Pierce, 650 F.2d 210, 213 (1981); Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1024 (1980); City and County of San Francisco v. United States, 615 F.2d 498, 500 (1980); City of Davis v. Coleman, 521 F.2d 661, 673 (1975).

An early decision in the Tenth Circuit on this issue established the standard of reasonableness as the proper test of the validity of negative determinations in that circuit. Wyoming Outdoor Coordinating Committee v. Butz, 484 F.2d 1244, 1249 (1973)(The case for no significance must be "compelling."). See also League of Women Voters of Tulsa, Inc. v. Corps of Engineers, 730 F.2d 579, 584-85 (1984); Jette v. Bergland, 579 F.2d 59, 64 (1978).

The Eleventh Circuit follows the reasonableness standard adopted by the Fifth Circuit. Cf. National Wildlife Federation v. Marsh, 721 F.2d 767, 778, n. 11 (11th Cir. 1983). Decisions of the Fifth Circuit published before October 1, 1981 are binding precedent in the new circuit. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

The District of Columbia Circuit has adopted the arbitrary and capricious standard to review decisions not to prepare an EIS, but has refined that standard to make it far less deferential than elsewhere. Sierra Club v. Peterson, 717 F.2d 1409, 1413 (1983); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-82 (1982); Committee for Auto Responsibility v. Solomon, 603 F.2d 992, 1002 (1979) cert. den., 445 U.S. 915 (1980); Maryland-National Capital Park and Planning Commission v. U. S. Postal Service, 487 F.2d 1029, 1037-40 (1973).2/

2/ The District of Columbia Circuit applies a four-part test:

(1) whether the agency took a "hard look" at the problem;
(2) whether the agency identified the relevant areas of environmental concern;
(3) as to the problems studied and identified, whether the agency made a convincing case that the impact was

The difference between these review standards is more than academic. See Joseph v. Adams, 467 F.Supp. 141, 151 (E.D.Mich. 1978). Greater deference to an agency's threshold decision is usually given under the arbitrary and capricious test than under the reasonableness test. Township of Lower Alloways Creek v. Public Service Electric and Gas Co., supra, 687 F.2d at 742. The latter is said to be a more exacting standard. First National Bank of Chicago v. Richardson, supra, 484 F.2d at 1381.

In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S.402, 416

(footnote 2 cont.) insignificant; and
(4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.

Cabinet Mountains Wilderness, supra, 685 F.2d at 682.

(1971), The Court observed that in order for a reviewing court to determine whether an agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement. A decision will generally be upheld under the arbitrary and capricious standard if the agency has considered the environmental issues and has offered a reasoned basis for its conclusion. Hanly v. Kleindienst, supra, 471 F.2d at 829-830. The Court of Appeals below concluded that the critical issue is "whether the finding of no significant impact is supported by the evidence."

Those courts which refuse to apply the standard of arbitrariness often do

so, in part, because it encourages bureaucratic evasion of responsibility. See Joseph v. Adams, supra, 467 F.Supp. at 151. (NEPA duties should "not be shunted aside in the bureaucratic shuffle." Flint Ridge Development Co. v. Scenic Rivers Ass'n, supra, 426 U.S. at 787.)

In Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973), the court observed:

> NEPA was intended not only to insure that the appropriate responsible official considered the environmental effects of the project, but also to provide Congress (and others receiving such recommendation or proposal) with a sound basis for evaluating the environmental aspects of the particular project or program. The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review.

The reasonableness standard also reflects the mandatory nature and higher standards of NEPA's §102(2)(C) requirements. Wyoming Outdoor Coordinating Committee v. Butz, supra, 484 F.2d at 1249.

The issue whether the proposed project would have a significant effect on the quality of the human environment presents a mixed question of law and fact. Hanly v. Kleindienst, supra, 471 F.2d at 829. See generally 5 K.C. Davis, Administrative Law Treatise §§29:9, 29:10 (1984). It is not appropriate to treat an agency's conclusion on this issue as a straightforward finding of fact. Bound up in the agency's decision is its interpretation of the relevant statutory language, particularly the meaning of the words "significantly," "affecting," and "human environment." Cf. Metropolitan Edison Co. v. People Against Nuclear

Energy, 103 S.Ct.1556, 1562 (1983).

The arbitrary and capricious standard is not well suited to the review of a mixed question of law and fact. Foundation for North American Wild Sheep v. U.S. Department of Agriculture, supra, 681 F.2d at 117.7 n. 24. An agency's legal interpretations are subject to stricter scrutiny than its policy determinations and fact findings. California v. Watt, 712 F.2d 584 (D.C. Cir. 1983). Interpretations of statutory language are properly judged by the "in accordance with law" test of the APA. 5 U.S.C. § 706(2)(A); Chrysler Corporation v. Brown, 441 U.S. 281, 318 (1979). Professor Davis argues that in reviewing agency determinations on mixed questions, courts either substitute their judgment for that of the agency or apply a standard of reasonableness. 5 Davis, Administrative

Law Treatise §29:10, at 372-75 (1984).

Although the courts defer to an agency's construction of a statute in certain instances, that construction will be upheld only if it is reasonable. Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 87 (1975). If it were possible or workable to separate statutory interpretation from factfinding in every case involving a finding of no significant impact, the arbitrary and capricious standard could readily be applied to the latter decision. Unfortunately, the distinction between the two decisionmaking processes -- legal interpretation and factfinding -- is not always clear. But see Hanly v. Kleindienst, supra, 471 F.2d at 829.

Where the agency does not articulate its reasoning carefully, its interpretation of the guiding statutory language is

often not clear. In such instances, a reviewing court can only speculate about the meaning attached to the governing words by the agency. Where an agency has applied an incorrect interpretation of law to facts, its decision should be set aside. See Citizens to Preserve Overton Park, Inc. v. Volpe, supra, 401 U.S. at 413-14.

In addition, a reviewing court must consider the effect given by the agency to binding regulations promulgated by the Council on Environmental Quality as well as those adopted by the agency itself. In reaching its decision not to prepare an EIS, an agency must follow procedures prescribed by regulation, incorporate in its decisionmaking factors mandated by relevant regulations and apply definitions contained in those regulations. See Fritiofson v. Alexander, 592 F.Supp. 120

(S.D.Tex. 1984). The correctness of the agency's procedural approach should be judged by the "in accordance with law" standard.

The arbitrary and capricious standard is particularly ill-suited to the circumstances of this case. The District Engineer's finding of no significant impact was based upon an interpretation of "human environment" that is arguably at odds with this Court's definition. Metropolitan Edison Co. v. People Against Nuclear Energy, supra, 460 U.S. at 772-73. CEQ regulations required him to consider both beneficial and adverse impacts in determining whether a project significantly affects the environment. 40 C.F.R. §1508.27(b)(1). Regulations of the Corps of Engineers limit the purpose of an environmental assessment to a determination whether a

project could have a significant impact on the environment -- not whether the project is justified. 33 CFR Part 230, Appendix B, ¶8(a). CEQ regulations also mandate that the agency not conduct a balancing of positive and negative impacts in determining whether a project could have a significant impact. 40 C.F.R. §§1508.14(b), 1508.27(b)(1).

This case provides an opportunity not only to resolve the conflict among the circuits over the appropriate review standard for negative determinations (i.e., decisions not to prepare an EIS based on findings of no significant impact), but also to articulate a test in such instances that is more useful than convenient labels such as "arbitrary and capricious" and "reasonable." See Gellhorn & Robinson , "Perspectives on Administrtative Law," 75 Colum. L. Rev.

771, 780 (1975). Although no statement of a judicial review standard will ever permit certainty of application in future cases, there is ample room for greater precision in the test so that the present degree of uncertainty and confusion can be reduced. See Levin, "A New Look at Scope of Review," 9 Adm. L. News, No. 3 (Summer 1984).

2. The ruling of the Court of Appeals that the consideration of alternatives is governed by the standard of arbitrariness conflicts with governing decisions of this Court.

In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978), the Court adopted the standard of reasonableness to assess the adequacy of the consideration of alternatives under NEPA.

Although the petitioner urged this Vermont Yankee standard below, the Court of Appeals ignored or rejected it. Instead, the court erroneously applied the standard of arbitrariness. See Texas Committee on Natural Resources v. Marsh, 736 F.2d 262, 270 (5th Cir. 1984), reh. den., 741 F.2d 823, in which the Court initially applied the arbitrary and capricious standard to consideration of alternatives, but later revised its opinion to correct the error.

Application of the less stringent standard of arbitrariness in this case resulted, as a practical matter, in excessive deference to the Corps in its selection and consideration of alternatives to the project. The Court of Appeals noted that applicable regulations require a discussion of alternatives including means by which any adverse

impacts can be reduced. Yet the opinion below concluded that the District Engineer satisfied the requirements of those regulations without considering a scaled-down project.

Accepting uncritically the rationale of the District Engineer, the Court of Appeals concluded that no alternative existed for parking other than filling; therefore, the only option not resulting in ecological damage to the aquatic ecosystem would be a no-build option. Such an all-or-nothing approach is unreasonable, if not arbitrary. Minimization of damage was never considered in this approach.

A scaled-down marina would reduce the adverse environmental impact, as the Court of Appeals acknowledged. In spite of its recognition of the binding regulations requiring consideration of a re-

duction in adverse environmental damage,[3/] the Court of Appeals determined that the District Engineer had no duty to evaluate a smaller project in this case because it neither achieved the same objectives as the proposed project nor resulted in significantly more than just a proportional reduction in ecological harm.

NEPA does not excuse consideration of reasonable alternatives because they will not achieve precisely the same objectives as the proposed action. Virtually no alternative will. See Town of Matthews v. Department of Transportation, 527 F.Supp. 1055, 1058 (W.D.N.C. 1981). ("Obviously, any genuine alternative to a proposed action

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3/ 40 C.F.R. §§1502.14, 1508.20; 33 C.F.R. Part 230, App. B, ¶8a.

will not fully accomplish all of the goals of the original proposal.") Accord, Rankin v. Coleman, 394 F.Supp. 647, 659 (E.D.N.C. 1975). Contra, Beaufort-Jasper County Water Authority v. U.S. Army Corps of Engineers, ____ F.Supp. ____, 14 ELR 20732 (D.S.C. 1984).

Similarly, the rule adopted by the Court of Appeals restricting the range of smaller projects that must be evaluated to those which would result in significantly more than just a proportional reduction in ecological harm is at odds with the very purpose of NEPA. Congress intended that federal agencies consider alternatives that produce nothing more than a simple reduction in environmental damage -- not just those which would result in extraordinary reductions in such damage. See Sen. Comm. on Int. & Ins. Aff., The National Environmental

Policy of 1969, S.Rep. No. 296, 91st Cong., 1st Sess. (1969), pp. 14, 19-20.

The Court of Appeals implicitly and erroneously assumed that a method exists by which a reduction in project size can be equated with an accompanying reduction in environmental harm. Even if a rough formula could be developed, the conclusion as to the degree of reduction in environmental harm could not be known until the scaled-down project is actually evaluated. That obviously was not done in this case.

It makes no sense to require that a no-build option, which meets none of the objectives of the proposed project, must be considered in every instance, 4/ yet

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4/ Kilroy v. Ruckelshaus, 738 F.2d 1448, 1454 (9th Cir. 1984); 40 C.F.R. §1502.14(d).

require consideration of a scaled-down project only when it meets all of the project objectives or results in some extraordinary reduction in ecological damage. Such a rule would itself be arbitrary.

3. The holding of the Court of Appeals that the District Engineer need not evaluate a scaled-down project unless it will achieve the same objective as the project or result in significantly more than just a proportional reduction in ecological harm conflicts with holdings of other circuits on this issue.

This case provides an occasion for the Court to resolve this conflict and to address the recurring issue whether agencies are required to consider partial options. One commentator has said:

> There is no more important aspect of NEPA than the obligation to discuss the alternatives of no action, of lesser action, and of an action with mitigation.

Rodgers, "A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny," 67 Geo. L. J., 699, 718 (1979). The rule applied by the Court of Appeals excusing the consideration of scaled-down alternatives in most instances goes to the heart of §102(2) of NEPA. 42 U.S.C. §4332(2). Resolution of the conflict among the circuits over the proper rule regarding scaled-down alternatives will avert confusion and forum shopping.

In Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 836 (1972), the District of Columbia Circuit established the rule in that circuit that an alternative may not be excluded from consideration simply because it offers only a partial solution. See also Alaska

v. Andrus, 580 F.2d 465, 472 (D.C. Cir. 1978), vacated on other grounds sub nom. 439 U.S. 922 (1978). The Second Circuit has followed that same rule. Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79, 93 (1974). But see City of New York v. Department of Transportation, 715 F.2d 732, 742-43 (2nd Cir. 1983).

The First Circuit has upheld an EPA decision to focus consideration of alternatives in reviewing a permit application by the primary objectives of the applicant. Roosevelt Campobello International Park Commission v. Environmental Protection Agency, 684 F.2d 1041, 1047 (1982). In Sierra Club v. Sigler, 532 F.Supp. 1222 (S.D. Tex. 1982), aff'd in part and rev'd in part on other grounds, 695 F.2d 957 (5th Cir. 1983), the court observed: "Clearly,

NEPA requires a discussion of all alternatives to a project which would reduce environmental harm while still achieving the goals to be accomplished." Id. at 1236.

The Ninth Circuit has held that an alternative need not be evaluated if it addresses only a "miniscule part of the problem." Life of the Land v. Brinegar, 485 F.2d 460, 471 (9th Cir. 1973). In California v. Block, 690 F.2d 753 (9th Cir. 1982), the court appeared to draw a line between those alternatives which clearly do not address the original proposal's objectives and those which are reasonably related to those goals, but may not address them as precisely or as fully as does the original proposal. See also National Wildlife Federation v. Administrator, Energy Research & Development Adm'n, 451 F.Supp. 1245, 1262

(D.D.C. 1978), aff'd in part, rev'd in part and vac. in part on other grounds, sub nom. Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Commission, 606 F.2d 1261 (D.C. Cir. 1979); Montgomery v. Ellis, 364 S.Supp. 517, 526 (N.D. Ala. 1973); Anderson, "The National Environmental Policy Act" in E. L. Dolgin & T. G. P. Guilbert (ed.), Federal Environmental Law (1974), supra, at 386.

It is also apparent from the administrative record that the greater environmental damage occurs in the subtidal, as opposed to the intertidal, areas that are to be affected by the filling for the project.5/ Reducing the need for filling

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5/ The reference in the final environmental assessment that, "the type of habitat to be disrupted is among the least productive of coastal ecosystems" is contrary to the evidence in the

would reduce the need to encroach into subtidal areas, thereby minimizing the adverse impact of the project. Without a careful examination of the administrative record, the Court of Appeals declared that the alternative of a scaled-down project could be dismissed without evaluation because there would only be a proportional reduction in environmental damage. That conclusion was without support in the record. At the very least, the District Engineer should have been required to evaluate a scaled-down project to determine whether the reduction in harm would be more than pro-

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(footnote 5 cont.) administrative record. The large majority of the filling for the project is in the subtidal area. The evidence in the record states that the subtidal area of the site "yielded above average populations and diversities of fish and worm species." See Admin. Record. Vol. I, Tab 1 p. 11 and Tab 10 p. 4.

portional as the only data in the record appeared to indicate.

4. The ruling of the Court of Appeals on the issue of NEPA's requirement that a federal agency independently verify data submitted to it decides an important question of law which has not been, but should be, addressed by this Court.

The Court of Appeals ruled that a federal agency is excused from the duty to verify data used in its environmental assessment when those data are not directly related to the precise basis upon which the agency makes its decision to go forward with a project. Such a rule impermissibly circumscribes the verification requirement.

The petitioner demonstrated below that the District Engineer made no effort to verify the applicant's statement that

the break-even point for financial feasibility for this marina project was 256 slips based upon a finance rate of 18% per year. Although the Corps clearly relied on the lack of financial feasibility in refusing to consider the alternative of a scaled-down marina, the Court of Appeals concluded that the Corps based its decision to approve the permit application exclusively on the basis that there is a "tremendous need" for marina slips in the region.

Even if the factual determination of the Court of Appeals were correct, a rule that the District Engineer need not verify the financial data in this case is contrary to the purpose of NEPA. The Corps may have had its mind made up to issue the pe .it before it considered any data other than those relating to the "overwhelming need" for slips, but the

accuracy of other data was crucial to the process.6/ Had other commenters, including the federal and state agencies that participated in the review, been advised that a substantially scaled-down project was financially feasible, their

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6/ Compare Massachusetts v. Watt, 716 F.2d 946 (Ist Cir. 1983):

> One cannot, however, argue that a NEPA statement is not legally necessary because the agency already knows what the statement will contain or because the agency plans to make its decision without regard to what the FEIS shows. In some instances, the statement may change a mind that previously thought itself unchangeable; in other instances the statement will simply allow the public to judge more fully the merits of the decision that was made.

See also Sierra Club v. U.S. Army Corps of Engineers, 701 F.2d 1011, 1032 (2d Cir. 1983)("fixed predetermination" to grant the permit).

comments to the Corps might have been quite different. Cf. Chelsea Neighborhood Associations v. U.S. Postal Service, 516 F.2d 1011, 1032 (2nd Cir. 1975). This case provides the Court with an opportunity to address the extent of the duty to verify, which is implicit in NEPA. 42 U.S.C. § 4332(2)(A); 40 CFR § 1506.5(b); Save Our Wetlands, Inc. v. Sands, 711 F.2d 634 (5th Cir. 1983); Council on Environmental Quality, "National Environmental Policy Act: Implementation of Procedural Provisions; Final Regulations," 43 Fed. Reg. 55978, 55987 (Nov. 29, 1978)(Comments on final regulations); C.E.Q., Environmental Impact Statements: An Analysis of Six Years' Experience by Seventy Federal Agencies, (Wash., D.C., Mar. 1976), p. 59.

The nature of information which must be verified, the circumstances under

which it must be verified, and the level of inquiry required of the agency are important, recurring issues that warrant consideration by this Court.

CONCLUSION

This case presents an unusual opportunity for the Court to review several important NEPA issues unlikely to be found together again. Any one of these issues might warrant consideration, but jointly they offer an efficient means of settling such longstanding and interrelated issues. For that reason,

the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 84-1172

Nancy H. Gee, Appellant,

vs.

Colonel Ronald E. Hudson, in his official capacity as District Engineer of the Norfolk District of the Corps of Engineers of the United States Department of the Army; and City of Norfolk, Virginia; and Lower Chesapeake Associates, a Virginia general partnership; and McClanahan Ingles, William B. Ellen, Arthur J. McQuillan, John F. Yamnitz, Partners, and Willoughby Harbor, Ltd., A Virginia Corporation,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, District Judge. (C/A 83-520-N)

Argued: August 8, 1984
Decided: October 3, 1984

Before RUSSELL, HALL and CHAPMAN, Circuit Judges.

CHAPMAN, Circuit Judge:

Plaintiff Nancy H. Gee appeals from

an order of the district court granting defendant's motion for summary judgment, denying her cross-motion for summary judgment and dismissing her complaint. The complaint challenges, under the National Environmental Policy Act, the issuance of a construction, dredge and fill permit by Ronald E. Hudson, Norfolk District Engineer, United States Army Corps of Engineers, to the City of Norfolk, Virginia pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403 and Section 404 of the Clean Water Act, 33 U.S.C. §1344. Finding no merit to any of the plaintiff's exceptions, we affirm.

I

On July 27, 1982, the City of Norfolk filed a permit with the Army Corps of Engineers for the construction of a

298-slip marina at the site of an abandoned ferry. As planned, the project would entail dredging and filling in areas of the Bay. A public notice was published and, in addition, actual notices were sent to 659 agencies and individuals.

On September 2, 1982, William Ellen, one of the developers, sent to the Corps a report concerning environmental impacts of a mitigation plan for the project. The Corps held a processing meeting on September 10, 1982. Only two federal agencies, the Environmental Protection Agency (EPA) and the National Marine Fisheries Service (NMFS), indicated preliminary reservations about the project. Both initially recommended preparation of an environmental impact statement (EIS).[1/] Because the initial recommendations were not authorized by the Regional

Directors of EPA and NMFS, the Corps' District Engineer proceeded with the permitting process despite the preliminary objections.

The Corps issued a preliminary environmental assessment (EA) on September 27, 1982. In it, the Corps noted that the Norfolk/Virginia Beach area has an acute shortage of marina slips. It concluded that the project would increase the number of slips in the area, provide additional employment opportunities, and increase the City's tax base. In addition to the need for slips, the EA stated that economic studies had indicated that a minimum of 260 slips was needed for the project to be economically feasible. The need for parking to accomodate the slips meant that fill would be placed in the Bay. The EA reported that the fill portion of

the project "represents a significant adverse impact upon the acquatic ecosystem." In discussing the extent of this impact, however, the Corps noted that the habitat to be disrupted is among the least productive of coastal ecosystems. In weighing all these considerations, the preliminary environmental assessment concluded that the socioeconomic benefits of the project outweighed the environmental loss.

The final environmental assesssment, issued by the Corps on December 10, 1982, contained the same findings as the preliminary assessment and concluded that the project would have no significant impact on the human environment, thereby obviating the need for an environmental impact statement. On the same day, the Corps issued a permit to the City clearing the project. Subsequently, the

City assigned the permit to Lower Chesapeake Associates.

Sometime after the permit was issued, Mrs. Gee, a member of a partnership that owns property near the site of the proposed marina, became aware of the project. She wrote to Colonel Hudson in January, 1983, complaining about lack of notice and objecting to the marina plans. By letter dated May 12, 1983, Colonel Hudson informed her that he had reviewed the project in light of her objections and had decided not to revoke or suspend the permit.

Not satisfied with this result, Mrs. Gee filed suit. In her complaint, she alleged inter alia: (1) that the Corps failed to prepare an environmental impact statement; and (2) that Colonel Hudson failed to give adequate consideration to alternatives and mitigation and (3) that

the Corps failed to verify the accuracy of certain financial data provided by the applicant. After reviewing the administrative record and hearing argument, the district court granted the defendant's motion for summary judgment and denied Mrs. Gee's cross-motion. This appeal followed.

II

Gee's primary contention on appeal is that the district court erred in not finding that the Corps was required to prepare an environmental impact statement for the project. The standard for determining whether an EIS should be prepared is whether the proposal is a "major Federal [action] significantly affecting the quality of the human environment." 42 U.S.C. §4332(c). It is conceded that this is a major Federal action within the meaning of the statute. The critical

issue, therefore, is whether the finding of no significant impact is supported by the evidence. The standard for review is arbitrariness. Webb v. Gorsuch, 699 F.2d 157, 160 (4th Cir. 1983); Providence Road Community Association v. EPA, 683 F.2d 80, 82 (4th Cir. 1982).

Gee contends that an EIS should have been prepared because Hudson found significant impacts in five of the eighteen categories evaluated as part of the environmental assessment. A close examination of the EA, however, reveals that the only environmental impact of consequence is the displacement of approximately 36,000 square feet of "intertidal and subaqueous habitat." The EA did observe that this represents "a significant adverse impact upon the acquatic [sic] ecosystem." However, such a finding is not equivalent to a finding

of a significant effect on the human environment.[2/] The regulations define "human environment" in terms of the interrelationship between people and the natural environment. 40 C.F.R. §1508.14. Thus 40 C.F.R. §1508.27 requires an analysis of the project's impact in different contexts, including society as a whole, the affected region, the affected interests and the locality.

Given this standard, we agree with the district court's conclusion that Hudson's finding of no significant impact was not arbitrary. The marina project was to be built on the commercially-zoned site of an abandoned ferry. There were already two other marinas operating adjacent to the site. The Corps specifically found that "no vegetated wetlands, are located on the site." As such, the project will cause no

disruption to "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lanes, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas." 40 C.F.R. §1508.27(b)(3). The project was neither controversial nor entailed unique or unknown risks.[3] 40 C.F.R. §1508.27(b)(4), (5). Finally, as the district engineer observed:

> The type of habitat to be disrupted is among the least productive of coastal ecosystems. Sandy, barren intertidal bottoms do not offer a stable surface of attachment, nor do they offer suitable habitat for many burrowing organisms, as the substrate is unstable and continually shifting.

Plaintiff further contends that Hudson failed to consider the cumulative effect of the project on the Bay. This failure to consider the effect of future

marinas was not arbitrary or capricious, since as this court noted in Webb v. Gorsuch:

> Generally, an administrative agency need consider the impact of other proposed projects when developing an EIS for a pending project only if the projects are so interdependent that it would be unwise or irrational to complete one without the others.

699 F.2d at 161 (citations omitted). Here, any future marinas are not interdependent with the project in question, but they are entirely speculative at this time. "If and when [other projects are developed], additional permits will be required, and the impact of them will be considered at that time." Id.[4]

III

Plaintiff also contends that the district court erred in holding that

Hudson had considered all reasonable alternatives and mitigation measures. If a proposal involves "unresolved conflicts concerning alternative uses of available resources," the agency must consider alternatives to the proposed action. 42 U.S.C. §4332(2)(E). In addition, the Corps' regulations require under certain circumstances that the decisionmaker discuss the alternatives and include suggested means by which the environment might be protected and by which adverse impacts could be reduced by conditioning the permit. The Corps concedes that the permit application involved "unresolved conflicts." Accordingly, it was required to consider alternatives and mitigation. The record reveals that the Corps did just that, finding that no alternative site existed for parking other than the filled-in Bay and thus that the only

option not resulting in ecological damage to the Bay would be a no-build option.

We also agree with the district court that Hudson's failure to consider a smaller marina was not arbitrary. Since a smaller marina would require less parking and thus less filling of the Bay, it would have a reduced impact on the Bay's ecosystem. However it will almost always be true that a smaller project will lead to less ecological damage than a larger one. The duty to consider alternatives in the size of a project only arises when a smaller project will achieve the same objectives or will result in significantly more than just a proportional reduction in ecological harm. Since there is demand for 298 marina slips and since some encroachment into the Bay is inevitable for any size marina, failure to consider a smaller

marina was not arbitrary in this instance.

IV

Gee also claims that the Corps relied heavily upon the applicant's assertion that the proposal would not be profitable unless it provided for at least 260 slips, and that this assertion was erroneous because it was based upon a finance rate of 18%. Gee argues that financing rates at the time were below this figure. Noting that the Corps has a duty to assure the accuracy of information submitted by the applicant, 33 C.F.R. Part 230, Appendix B ¶3, Gee argues that the defendant violated NEPA and Corps regulations. A review of the record does not support plaintiff's assertions. Rather, it reveals that it was the great need for marina spaces, not the projections concerning profitability,

that led the developers to propose a 298-slip facility instead of a smaller facility. Given this, the correctness of the finance rate figure was not critical to the Corps' decision to issue the permit.

AFFIRMED.

FOOTNOTES

1/ The National Environmental Policy Act (NEPA) provides that the decision to prepare an "environmental assessment" (EA) or an "environmental impact statement" (EIS) is to be made according to the regulations of individual agencies. NEPA directs each federal agency to adopt procedures in consultation with the Council on Environmental Quality (CEQ) for implementing the NEPA requirements. 40 C.F.R. §1507.3(a).

Pursuant to NEPA and the CEQ's implementing regulations, the Army Corps of Engineers adopted policies and procedures for implementing NEPA. 33 C.F.R part 230 et seq. Under these procedures, the Corps must prepare an EA for any proposed action. The EA is intended to be brief and to the point. The overall aim of the EA is to determine whether the preparation of a more exhaustive EIS is

necessary for the particular case. The standard for determining whether a proposal requires an EIS in addition to an EA is is whether the action will have a significant effect on the human environment. 42 U.S.C. §4332(c).

2/ None of the cases cited by Gee support her contention that effect on the natural environment is alone sufficient to mandate an EIS. In the case most strongly relied on by Gee, Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974) the project at issue clearly had an impact on the interrelationship between people and the natural environment in addition to its impact on the natural environment:

> Apart from what may be referred to as "existence value," the evidence indicated that there are direct effects on the human environment from logging. Logging creates excess nutrient run-off which causes algae growth in the lakes and streams, affecting water purity. Logging roads may cause erosion and water pollution and remain visible for as long as 100 years; this affects the rustic, natural beauty of the [area], recognized as unique by the Forest Service itself. Logging destroys virgin forest, not only for recreational use, but for scientific and educational purposes as well. All these

> are significant impacts on the human environment.

498 F.2d at 1322 (footnotes omitted)(emphasis in original). The cumulative effect of the project for which the court in Natural Resources Defense Council, Inc. v. Grant, 341 F.Supp. 356 (E.D.N.C. 1972) required preparation of an EIS also clearly affected the human environment. The projects in Grant, considered collectively, represented "1562 miles of stream channelization, affecting over 100,000 acres of wetlands, and having very serious repercussions upon fish and wildlife in the Coastal Plains of North Carolina." 341 F.Supp. at 367. Finally, the court in Natural Resources Defense Council, Inc. v. Vaughn, 566 F. Supp. 1472 (D.D.C. 1983) predicated a finding of a significant effect on the human environment on the State of South Carolina's "formal intervention and active participation in [the] proceeding to ask that an EIS be prepared;" a factor absent here.

3/ Public notices were sent to 659 agencies and individuals. In the following thirty days no objections were received other than the preliminary letters sent by EPA and NMFS and Gee is the only person to press objections.

4/ In addition, plaintiff maintains that Hudson erroneously used a balancing test in deciding not to prepare an EIS. The record, however, indicates that a balancing test was only used in rejecting the no-build option in considering alter-

natives to the project. The decision not to prepare an EIS was predicated upon a finding of no significant impact.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

NANCY H. GEE, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 83-520-N
COLONEL RONALD E. HUDSON, et al., Defendants.	)	

ORDER AND OPINION

The plaintiff challenges the decision of the United States Army Corps of Engineers granting a construction permit under §10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403, and §404 of the Clean Water Act, 33 U.S.C. §1344. The permit provides for the construction of a 298 slip recreational marina adjacent to and in Willoughby Bay in Norfolk, Virginia, in the area of what was a former ferry slip. After the parties filed cross motions for summary judgment,

oral argument was heard on January 11, 1984. For the reasons expressed herein, the plaintiff's motion shall be DENIED, and the defendants' motion shall be GRANTED.

I. THE FACTS

On July 27, 1982, the City of Norfolk filed a permit application with the Army Corps of Engineers. The Corps assigned number 82-0609-01 to the application and on August 18, 1982, a joint Federal/State Public Notice describing the project was issued. A thirty day comment period followed issuance of the public notice. In addition, actual notice was mailed to 659 agencies and individuals. No objections to the proposal were received during this time.

A joint processing meeting was held on September 10, 1982, at which time the Corps indicated its preliminary approval

of the project as proposed. The only state or federal agencies which expressed inhibitions about the project were the Environmental Protection Agency (EPA) and the National Marine Fisheries Service (NMFS). The latter agency found the project undesirable and recommended that the Corps undertake a complete Environmental Assessment together with a formal mitigation proposal. The EPA likewise recommended an Environmental Assessment, and stated that its primary concern is "the unmitigated loss of almost an acre of aquatic habitat for a non-water dependent parking area." Both agencies expressed willingness to assist the applicant in formulating a reasonable mitigation plan. Neither agency took further action against the project.

The Corps issued a Preliminary Environmental Assessment on September 27,

1982. The EA found that the Norfolk/Virginia Beach area has an acute shortage of marina slips. Relying upon economic feasibility studies which indicated that the proposed marina would need at least 260 slips to be profitable, the report found that the demand for parking facilities for such a marina could only be met by expanding into the waterway. The EA recognized that the project would have a significant impact upon the aquatic environment, but concluded that socioeconomic benefits outweighed the environmental concerns.

On December 10, 1982, the Corps issued its Final Environmental Assessment. It contained the same findings as the earlier assessment, and concluded that the project would have no significant impact on the quality of the human environment, thereby obviating the need

for an Environmental Impact Statement. On the same day, the Corps issued a permit to the City of Norfolk to construct the proposed marina. The permit authorizes the City to ...

> ...construct a recreational marina consisting of: maintenance construction of approximately 475 linear feet of timber sheet pile bulkhead; construction of approximately 480 feet of riprap revetment; 2,316 linear feet of open-pile timber pier; two 50 foot by 3-foot travel lift piers; a 50-foot by 20-foot open-pile platform for a maintenance building; a 50-foot by 20-foot openpile timber platform for a marina building; 900 feet of floating, rubber tire breakwater, and the installation of 29 anchor pilings for a breakwater. You are also authorized to dredge, by bucket method, about 40,000 cubic yards of sandy loam over silt and mud and place 17,000 cubic yards of suitable material as fill behind the proposed revetment and bulkhead and the remaining 23,000 cubic yards to be loaded into scows and hauled to and deposited in the Craney Island

> Rehandling Basin in Hampton Roads, Virginia. You are further authorized to maintenance dredge on an as needed basis for the next 10 years with disposal in the Craney Island Disposal Area, in Willoughby Bay, at a location on your property at the old ferry landing, Bayville Street, Willoughby Spit, Norfolk, Virginia, in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit, in 12 sheets marked: "PROPOSED MARINA IN NORFOLK AT WILLOUGHBY STATE: VA. APPLICATION BY: NORFOLK DATE: JULY 1982", ...

As issued, the permit was subject to twenty-one general conditions and twenty-four special conditions. The City of Norfolk subsequently assigned the permit to Lower Chesapeake Associates.

Sometime after the permit was issued, the plaintiff in this action, a partner in a partnership which owns property near the site of the proposed marina, became aware of the project. On

January 21, 1983, she wrote to Colonel Hudson, the District Engineer who granted the permit, complaining of lack of notice and objecting to the proposed marina. In response, Colonel Hudson gave the plaintiff an opportunity to offer her comments on the project and held the assignment to Lower Chesapeake Associates in abeyance pending a review of the plaintiff's objections. The Colonel, however, refused to hold a public hearing or prepare an Environmental Impact Statement.

Colonel Hudson met with the plaintiff on March 4, 1983 and discussed her objections. In a letter dated May 12, 1983, Colonel Hudson informed the plaintiff that he had completed the review of the project, and that he had decided not to revoke or suspend the permit.

The plaintiff brought this suit to enforce the provisions of the National

Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq. In her complaint, she alleges (1) Colonel Hudson violated Corps procedures by failing to verify the accuracy of information provided by the applicant; (2) Colonel Hudson violated NEPA and applicable regulations by failing to prepare an Environmental Impact Statement (EIS); (3) Colonel Hudson failed to give adequate consideration to alternatives and mitigation; and (4) the project has been modified since issuance of the permit.

II. THE APPLICABLE LAW

The parties agree that the proper standard of review is whether Colonel Hudson's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). In determining whether the Corps applied the appropriate

law, this Court is guided by certain principles. First, deference must be given to an official's interpretation of the statute which he is charged to administer. E.I. DuPont de Nemours & Co. v. Train, 430 U.S. 112, 134-35 (1977). This Court must give greater deference to the Corps' interpretation of its own agency regulations. Train v. Natural Resources Defense Council, Inc. 421 U.S. 60, 87 (1975).

A reviewing court may not substitute its judgment for that of the administrative official. Provided the official's decision was based upon a consideration of all relevant evidence and not a "clear error of judgment", it is immaterial whether this Court would have reached a contrary result. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

Finally, the reviewing court must inquire "whether the [agency's] action followed the necessary procedural requirements." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. at 417.

In passing the National Environmental Policy Act, Congress set forth the following purpose:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. at §4321. Underlying NEPA is the premise that "responsible officials would think about environment before a significant project was launched; that what would be assessed was a proposed

action, not a fait accompli; that alternatives to such action would be seriously canvassed and assayed; and that any irreversible effects of the proposed action would be identified." City of Boston v. Volpe, 464 F.2d 254, 257 (1st Cir. 1972); see Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973) (NEPA is an environmental full-disclosure law).

The substance of NEPA is contained within §4332. That section provides in relevant part:

> §4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.
>
> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§4321 et

seq.], and (2) all agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

***

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

***

The procedures in this subparagraph shall not relieve the Federal official of his repsonsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under thie Act [42 USCS §§4321 et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[;]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

***

42 U.S.C. §4332 (emphasis added). From the language of the Act, it is clear that NEPA does not mandate certain results, but simply establishes "reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations." Chelsea Neighborhood Assoc. v. United

States Postal Service, 516 F.2d 278 (2d Cir. 1975).

Established by NEPA, the Council on Environmental Quality promulgated regulations for implementing the Act. 40 C.F.R. Parts 1500-1508. These regulations are "applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act ... except where compliance would be inconsistent with other statutory requirements." 40 C.F.R. §1500.3.

Part 1508 of the regulations defines the terminology of NEPA. An environmental assessment (EA) is defined as follows:

> "Environmental Assessment":
> (a) Means a concise public document for which a Federal agency is responsible that serves to:
> (1) Briefly provide sufficient evidence and analysis for determining whether to

> prepare an environmental impact statement or a finding of no significant impact.
> (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
> (3) Facilitate preparation of a statement when one is necessary.
> (b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

40 C.F.R. §1508.9.

The regulations define an Environmental Impact Statement as "a detailed written statement as required by sec. 102(2)(C) of the Act [42 U.S.C. §4332(C)]." 40 C.F.R. §1508.11.

The decision whether to prepare an EA or EIS is to be made according to the regulations of individual agencies. Section 1507.3 directs each federal agency to adopt procedures in consultation with

the CEQ for implementing the NEPA requirements. 40 C.F.R. §1507.3(a). The procedures are subject to CEQ approval and they must comply with the NEPA regulations. 40 C.F.R. §1507.3(a) and (b).

Pursuant to NEPA and the CEQ's implementing regulations, the Army Corps of Engineers adopted policies and procedures for implementing NEPA. 33 C.F.R. Part 230 et seq. Appendix B to Part 230 offers explanatory guidance for these procedures. The paragraphs relevant to this action are as follows:

***

> 8. EA/FONSI Document. (See 40 CFR 1508.9 and 1508.13 for definitions).
>
> a. Environmental Assessment (EA). The district engineer shall prepare an EA as soon as practicable after all relevant information has been made available to the district engineer (i.e., after the comment period for the public notice announcing receipt of the permit application has expired) and prior to

> preparation of the Findings of Fact (FOF). The EA shall include a discussion of reasonable alternatives. However, when the EA confirms that the impact of the applicant's proposal is not significant, there are no "unresolved conflicts concerning alternative uses of available resource ..." (Section 102(2)(E) of NEPA), and the proposed action is a water dependent activity, the EA need not include a discussion on alternatives to the proposal. In all other cases the EA must address all the alternatives, that go before the ultimate decision maker. This discussion will include suggested means by which the environment might be protected and by which adverse impacts could be reduced by conditioning of the permit. The EA shall be a brief document (should not normally exceed 15 pages) primarily focusing on whether or not the entire project subject to the permit requirement could have significant effects on the environment but shall not be used to justify a decision ... The EA shall conclude with a FONSI (See 40 CFR 1508.13) or a determination that an EIS is required.

***

c. FONSI. If, the district engineer determines that a permit proposal's impact is not significant, the district engineer shall include a FONSI (See 40 CFR 1508.13) at the end of the EA. The combined document (i.e., both the EA and the FONSI) shall be dated, signed, and placed in the permit record. Where the district engineer has delegated authority to sign permits on his behalf, he may similarly delegate the signing of the EA/FONSI document. The FONSI will be based on information contained in the EA and other pertinent data obtained from cooperating Federal agencies having jurisdiction by law or special expertise, the interested public, the applicant, and Corp's expertise.

9. Findings of Fact (FOF). In accordance with 33 C.F.R. Part 325, the District Engineer shall prepare as a separate document, an FOF for every permit application not requiring an EIS. The FOF may reference the EA to avoid duplication.

Reducing the statute and wealth of interpretive regulations to a nutshell, it appears that the Corps must prepare an

EA for any proposed action. The EA is intended to be brief and to the point. The overall aim of the EA is to determine whether the preparation of a more exhaustive EIS is necessary for the particular case. The standard for determining which proposals require an EIS and which require merely an EA is whether the action will have a significant affect on the human environment. 42 U.S.C. §4332(c). With the law and facts sufficiently laid out, the Court will now address the plaintiff's claims in the order in which they were presented.

III. THE PLAINTIFF'S COMPLAINT

A. Colonel Hudson Failed to Abide by Corps Procedure by not Verifying Information Provided by the Applicant.

The plaintiff claims that the Corps relied heavily upon the applicant's assertion that the proposal would not be profitable unless it provided for at

least 260 slips, and that this assertion was erroneous because it was based upon a finance rate of 18%. The plaintiff argues that financing rates at the time were well below this figure. Noting that the Corps has a duty to assure the accuracy of information submitted by the applicant, 33 C.F.R. Part 230, Appendix B, ¶3, the plaintiff argues that the defendant violated NEPA and Corps regulations. More importantly, the plaintiff avers that uncritical acceptance of the applicant's representation on profitability prevented the Corps from considering a smaller marina in mitigation.

In essence, this claim is merely an extension of Claim III where the plaintiff alleges that Colonel Hudson failed to give adequate consideration to alternatives and mitigation. Accordingly, the

Court will address this contention infra.

B. Failure to Prepare an EIS.

The gravamen of the plaintiff's complaint is that the circumstances of this case required that an EIS be prepared. As stated previously, the standard for determining whether an EIS should be prepared is whether the proposal is a "major Federal [action] significantly affecting the quality of the human environment." 42 U.S.C. §4332(C). The regulations define "major Federal actions" as "actions with effects that may be major and which are potentially subject to federal control and responsibility." 40 C.F.R. §1508.18. The defendants do not seriously contend that this is not a major Federal action within the meaning of the statute. The crucial issue, therefore, is whether the finding of no significant impact (the

"FONSI") is supported by the evidence.

The standard in this circuit for reviewing a decision on whether an EIS should have been prepared is arbitrariness. "[T]he decision not to prepare an EIS is left to the 'informed discretion' of the agency. ... 'Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately.'" Providence Road Community Assoc. v. Environmental Protection Agency, 683 F.2d 80, 82 (4th Cir. 1982) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 413 (1976)).

The Court is aided in its determination of whether the FONSI decision was arbitrary by the NEPA regulations. Section 1508.27 states:

> "Significant" as used in NEPA requires considerations of both context and intensity:
>
> (a) Context. This means that the significance of an

> action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests and the locality. Significance varies with the setting of the proposed action... Both short and long term effects are relevant.
>
> (b) Intensity. This refers to the severity of impact... The following should be considered in evaluating intensity:
>
> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

40 C.F.R. §1508.27.

Colonel Hudson concedes that the project will have a significant adverse impact on the aquatic ecosystem but argues that a significant effect on the human environment does not necessarily follow. This Court believes that this finding is not arbitrary.

The plaintiff's argument that a significant impact on the aquatic ecosystem is synonomous with a significant impact on the human environment is not supported by NEPA and the implementing regulations. NEPA itself establishes the standard, and it states "significantly affecting the quality of the human environment." The regulations define

"human environment" in terms of the interrelationship between people and the natural environment. 40 C.F.R. §1508.14. Moreover, the administrative record shows that the displaced area is a condemned shellfish area consisting of approximately 36,000 square feet of sandy, barren intertidal bottoms having no stable surface of attachment. The area is not well-suited for burrowing organisms because the bottom is continually shifting. Finally, the disrupted habitat is considered the least productive of coastal ecosystems.

The Court is satisfied that Colonel Hudson considered all the relevant evidence. NEPA was enacted not to mandate specific results but to ensure certain procedural steps are taken. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978). It matters not

that this Court may desire a different result. Id. For this Court to hold that an EIS is necessary, it would have to hold that the environmental concerns were not given the weight they deserved. But such is precisely what this Court may not do. Strycker's Bay Neighborhood, etc. v. Karlen, 444 U.S. 223, 227 (1980).

C. Failure to give adequate consideration to alternatives and mitigation.

If a proposal involves "unresolved conflicts concerning alternative uses of available resources", the agency must consider alternatives to the proposed action. 42 U.S.C. §4332(2)(E). In addition, the Corps regulations require under such circumstances that the decisionmaker discuss the alternatives, and "include suggested means by which the environment might be protected and by which adverse impacts could be reduced by conditioning

the permit." 33 C.F.R. Part 230, Appendix B, ¶8a.

Colonel Hudson conceded that the permit application involved "unresolved conflicts." Accordingly, he was required to consider alternatives and mitigation. Colonel Hudson contends that the only alternative was the no-build option "since no alternatives exist for parking and the project would have to be scrapped. The no-build alternative fails to meet the pressing need for marina spaces. Here, the socioeconomic need for the project outweighs the environmental detriment" (Ex. 22).

The plaintiff argues that Colonel Hudson was misguided by the applicant's use of a finance rate at 18% and that a rate more in line with the going interest rates would make the project profitable at a much smaller size. Although the

plaintiff claims that an 18% interest rate is not realistic, the plaintiff failed to offer any evidence to the contrary in the administrative proceeding below. This Court is not in a position to surmise what risk factor lending institutions ascribe to the project. This Court may take judicial notice that Chesapeake Bay is a navigable body of water, United States v. Griffin, 58 F.2d 674, 675 (W.D.Va. 1932), and as such, any structure extending into it is subject to the "absolute power of Congress over the improvement of navigable rivers." United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 62 (1913). The effects of public regulation and control of navigable waterways on the interest rate chargeable to construction projects on those waterways is not known, and this Court will not guess what that rate may

be.

Although the plaintiff and her husband may have some awareness of interest rates as they are engaged in the rental, buying, selling and speculation of realty in the area, the record is completely devoid of any evidence or any basis for employing another interest rate. Generally, a litigant obtains an expert opinion as to interest which might be chargeable on a project commensurate with the risk to a lender. The risk of floods or storms as well as the Federal Government's right to require removal of any obstruction which they have permitted may affect the interest rate. Lenders seem to question the ownership of the bottom land or obstructions to navigable waters which are manmade and not natural. The developer offered his proposal and the plaintiff merely makes a general

challenge with no evidence nor documentation of any kind. Whether the plaintiff may have some source of funds at a lesser rate due to his prior development activities is completely unknown.

Moreover, it should be noted that the "unresolved conflicts" grow out of the objections of NMFS and EPA. These agencies expressed concern about the precedential effect of allowing an acre of aquatic habitat to be displaced by a non-water dependent use. A smaller marina would not obviate this concern. Regardless of the size of the marina, it would still need parking spaces. The record shows that there simply is no room for a parking lot on Willoughby Spit, and thus the need can only be met by expanding into the waterway. The fear of EPA and NMFS, therefore, would not be eliminated by a smaller marina.

Accordingly, Colonel Hudson's failure to consider a smaller marina does not appear arbitrary. The Court is not saying that the Colonel was exempted from considering alternatives pursuant to ¶8a of Appendix B, 33 C.F.R. Part 230. Rather, the Court finds that failure to consider a smaller marina was not arbitrary in light of the fact that encroachment into the Bay for a parking lot is inevitable if the proposal is to go forth in any form.

Moreover, the Court is not willing to hold that rejection of the no-build option was arbitrary. The need for boating slips in the Tidewater area is clear. Willoughby Bay offers an ideal location, and as stated in the preliminary EA:

> The need for additional marina space has to be met, and it would appear more practical to locate one large marina project in an area ideally suited

> for a marina where environmental productivity is low than it would be to piecemeal several smaller marina projects in less ideal locations where ecological productivity is likely to be higher and the cumulative impacts of an equal number of marina spaces is likely to be significantly larger.

D. The Project has been modified since the permit was issued.

The plaintiff complains that the permit calls for a floating tire breakwater while the Conditional Use Permit granted by the City of Norfolk provides for a floating concrete breakwater. Since this suit was instituted, the defendant Lower Chesapeake Associates has applied for a permit modification. In any event, no violation of the Corps permit has yet occurred, and thus the claim is premature. Abbot Laboratories v. Gardner, 387 U.S. 136, 148 (1967).

IV.

For the foregoing reasons, the plaintiff's motion for summary judgment is DENIED, and the defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

ROBERT G. DOUMAR
United States District Judge

At Norfolk, Virginia
February 15, 1984

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. § 706 (Administrative Procedure Act):

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicablity of the terms of an agency action. The reviewing court shall --
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *
>
> (D) without observance of procedure required by law;

42 U.S.C. § 4332 (National Environmental Policy Act):

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies

> set forth in this chapter, and (2) all agencies of the Federal Government shall --
>
> (A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;
>
> * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official ....
>
> * * *
>
> (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning conflicting alternative uses of available resources;

33 CFR Part 230, Appendix B (Regulations of the Corps of Engineers):

> § 3 Development of Information and Data.
>
> * * *
>
> The district engineer shall

assure the conduct of an independent evaluation and shall be responsible for the accuracy of the information submitted by the applicant.

* * *

§ 8 EA/FONSI Document. (See 40 CFR 1508.9 and 1508.13 for definitions).

a. Environmental Assessment (EA). The district engineer shall prepare an EA as soon as practicable after all relevant information has been made available to the district engineer (i.e., after the comment period for the public notice announcing receipt of the permit application has expired) and prior to preparation of the Findings of Fact (FOA). The EA shall include a discussion of reasonable alternatives. ... This decision will include suggested means by which the environment might be protected and by which adverse impacts could be reduced by conditioning of the permit. ...

* * *

b. Responsibilities in Preparing EA. If information for an EA is undertaken by an outside consultant or prepared by the applicant, the district engineer is responsible for independent verification and use of the data, evaluation of the environmental issues, and for the scope and

content of the EA. Preparation of an EA shall be based on considerations discussed 40 CFR Parts 1501, 1506 and 1508 and the instruction contained in paragraph 9 of the basic regulation.

40 CFR § 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the

jurisdiction of the lead agency.
(d) Include the alternative of no action.
(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 CFR § 1506.5 (Regulations of the Council on Environmental Quality):

(b) Environmental assessments. If any agency permits an applicant to prepare an enviornmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

40 CFR § 1508.8 (Regulations of the Council on Environmental Quality):

"Effects" include:
(a) Direct effects, which are caused by the action and occur at the same time and place.
(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still

reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social or health, whether direct, indicrect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

40 CFR § 1508.14(Regulations of the Council on Environmental Quality):

"Human Environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact

statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the enviromental impact statement will discuss all of these effects on the human environment.

40 CFR 1508.20 (Regulations of the Council on Environmental Quality):

"Mitigation" includes:
(a) Avoiding the impact altogether by not taking a certain action or parts of an action.
(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
(e) Compensating for the impact by replacing or providing substitute resources or environments.

40 C.F.R. 1508.27 (Regulations of the Council on Environmental Quality):

"Significant" as used in NEPA requires consideration of both context and intensity:

(a) Context. This means that

the significance of an action must be analyzed in several contexts such as society as a whole (human, national), and the affected regions, the affected interests and the locality. Significance varies with the setting of the proposed action ***. Both short and long term effects are relevant.

(b) Intensity. This refers to the severity of impact ***. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as promimity to historic or cultural resources, park land, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent

for future actions with significant effects or represents a decision in principle about a future consideration.

No. 84-1062

In the Supreme Court of the United States

OCTOBER TERM, 1984

NANCY H. GEE, PETITIONER

v.

CLAUDE D. BOYD, III, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard of review in determining that the Corps of Engineers did not act arbitrarily and capriciously in declining to prepare an environmental impact statement for a marina project.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) and the opinion of the district court (Pet. App. 19a-51a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1984, and the petition for a writ of certiorari was filed on December 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves petitioner's longstanding efforts to halt construction of a marina at an abandoned ferry site near property she owns on Willoughby Bay in Norfolk, Virginia. In July 1982, respondent City of Norfolk filed a permit application with the United States Army Corps of

Engineers, as required by Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, and Section 404 of the Clean Water Act of 1977, 33 U.S.C. 1344. The City proposed construction of a 298-slip marina, with boat maintenance facilities, at the site of an abandoned ferry and near two existing marinas. Because there was no space for parking in the area, the proposal contemplated dredging and filling in a portion of the waterway to provide needed parking. The City's permit application discussed the great imbalance between supply and demand for boat slips in the Norfolk area and noted the suitability of the proposed location for a marina. Pet. App. 2a-3a, 20a.

The Corps issued a preliminary environmental assessment (EA) on September 27, 1982.[1] The EA noted that the Norfolk area has an acute shortage of boat slips and that the project would increase the number of slips in the area, provide additional employment opportunities, and increase the City's tax base. Pet. App. 4a. The EA also noted that economic studies had shown that a minimum of 260 slips was needed for the project to be economically feasible (*ibid.*). The need for parking to accommodate boaters meant that fill would be placed in a portion of the waterway. The EA acknowledged that the fill aspect of the project "represents a significant adverse impact upon the aquatic ecosystem." *Id.* at 5a. In discussing that impact, however, the EA noted that the habitat that would be disrupted was "among the least productive of coastal ecosystems" (*ibid.*).

In considering alternatives to the proposal, the EA noted (C.A. App. 124):

[1]As explained by the court of appeals (Pet. App. 15a-16a n.1), an EA is a brief document prepared to determine whether or not a proposed action will have a significant effect on the human environment, thereby requiring preparation of an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C).

> The need for additional marina space has to be met, and it would appear more practical to locate one large marina project in an area ideally suited for a marina where environmental productivity is low than it would be to piecemeal several smaller marina projects in less ideal locations where ecological productivity is likely to be higher and the cumulative impacts of an equal number of marina spaces is likely to be significantly larger. [2]

The final EA, issued by the Corps on December 10, 1982, contained the same findings as the preliminary EA and concluded that the project would have no significant impact on the human environment, thereby making unnecessary the preparation of an environmental impact statement (EIS) under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). On the same day, the Corps issued a permit to the City clearing the project, subject to 21 general conditions and 24 special conditions. Pet. App. 5a.

After the permit had been issued, petitioner, a partner in a venture that owns property near the site of the proposed marina, became aware of the project. She wrote to Colonel Hudson[3] in January 1983, complaining about lack of notice and objecting to the marina plans.[4] Colonel Hudson considered petitioner's objections, but he advised her by letter

[2]The EA noted that the "no-build" alternative would be the least environmentally damaging option, but it also noted that this alternative would fail to meet the pressing need for marina space (C.A. App. 125).

[3]At the time, Colonel Ronald E. Hudson was the District Engineer of the Norfolk District of the Corps of Engineers. Colonel Claude D. Boyd, III now holds that position, and petitioner has substituted Colonel Boyd in this action pursuant to Rule 40.3 of the Rules of this Court.

[4]Upon receipt of the City's permit application, the Corps published a public notice of the application, and it also sent actual notices to 659 agencies and individuals. A 30-day public comment period followed,

dated May 12, 1983, that he had decided not to revoke or suspend the permit. Pet. App. 6a. Thereafter, the Corps approved the City's assignment of the permit to respondent Lower Chesapeake Associates.

2. Petitioner challenged the issuance of the permit by filing suit in the United States District Court for the Eastern District of Virginia. She alleged that (1) the Corps failed to verify the accuracy of certain financial data submitted by the applicant, (2) the Corps violated NEPA by not preparing an EIS, and (3) Colonel Hudson failed to give adequate consideration to alternatives and mitigation. After reviewing the administrative record and hearing argument, the district court granted summary judgment for the respondents and dismissed the complaint (Pet. App. 19a-51a). Both the district court and the court of appeals denied petitioner's motions for an injunction pending appeal (Pet. 16). Accordingly, construction commenced and is continuing.

The court of appeals affirmed the district court in all respects (Pet. App. 1a-18a). In reviewing petitioner's contention that the Corps should have prepared an EIS, the court held that the Corps' decision that the marina would have no significant impact on the human environment was not arbitrary (*id.* at 9a). The court noted that the marina was to be built at an abandoned ferry site and that two existing marinas were operating near the site (*ibid.*). The court also noted that the Corps had found that no vegetated wetlands or unique areas of geographic, historic, or cultural significance would be affected by the project (*id.* at 9a-10a; see 40 C.F.R. 1508.27(b)). The court agreed with the Corps

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during which no objections were received. Pet. App. 20a. Petitioner states (Pet. 13-14) that 47 property owners in the area submitted petitions objecting to the project. Petitioner never made that allegation in the trial court or the court of appeals, and she does not offer any record support for it.

that the only environmental impact of the project — the filling of an ecologically unproductive portion of the waterway — did not amount to a significant effect on the *human* environment within the meaning of NEPA (Pet. App. 8a-9a).

The court of appeals also held that the Corps did not act arbitrarily in declining to consider a smaller marina as an alternative to the proposed 298-slip marina (Pet. App. 11a-14a). The court noted that a smaller project almost always will result in reduced environmental impacts, but it did not believe that NEPA requires consideration of a smaller project in all cases (*id.* at 13a). The court concluded that the obligation to consider a smaller project arises only when that alternative will accomplish essentially the same purposes as the proposed project or will result in a significant reduction in ecological harm (*ibid.*). Here, the court concluded that the failure to consider a smaller marina was not arbitrary in light of the great demand for a large marina, coupled with the fact that *any* marina project would entail some filling of the waterway (*id.* at 13a-14a).

Finally, the court of appeals rejected petitioner's contention that the Corps had improperly relied upon unverified financial data. The court found no record support for petitioner's assertion that the developer's projected financing rate of 18% had been a key element in the Corps' decision to approve the project (Pet. App. 14a). Instead, the court found that the developers proposed a 298-slip marina because of the tremendous need for marina slips, and not because of the projections concerning financial profitability (*id.* at 15a). Inasmuch as the projected interest rate was not a critical factor in the Corps' decision to issue the permit, the court refused to find a NEPA violation in the Corps' failure to verify that projected rate (*ibid.*).

ARGUMENT

1. Petitioner asserts (Pet. 19-40) that the court of appeals erred in applying the arbitrary and capricious standard of review to the Corps' decision not to prepare an EIS in this case, in lieu of the ostensibly stricter test of "reasonableness." [5] Although petitioner contends that there is a great difference between the two standards, in reality the issue is a semantic quibble that results in little, if any, practical difference in result. Accordingly, review by this Court is not warranted.

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[5]Five circuits test an agency's determination not to prepare an EIS under the traditional arbitrary and capricious standard for review of agency action. *Grazing Fields Farm* v. *Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980); *Hanly* v. *Kleindienst*, 471 F.2d 823, 828-829 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973); *Webb* v. *Gorsuch*, 699 F.2d 157, 159 (4th Cir. 1983); *Nucleus of Chicago Homeowners Ass'n* v. *Lynn*, 524 F.2d 225, 229 (7th Cir. 1975), cert. denied, 424 U.S. 967 (1976); *Sierra Club* v. *Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983).

Four other circuits have enunciated a "reasonableness" standard of review. *Save Our Ten Acres.* v. *Kreger*, 472 F.2d 463, 466 (5th Cir. 1973); *Winnebago Tribe of Nebraska* v. *Ray*, 621 F.2d 269, 271 (8th Cir.), cert. denied, 449 U.S. 836 (1980); *Foundation for North American Wild Sheep* v. *United States Dep't of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973). The Eleventh Circuit presumably falls within this grouping as well, by virtue of *Bonner* v. *City of Prichard*, 661 F.2d 1206 (1981) (en banc) (adopting as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981).

The Third Circuit has applied the reasonableness test in one case but withheld judgment on whether that standard would be proper in all cases. *Town of Lower Alloways Creek* v. *Public Service Electric & Gas Co.*, 687 F.2d 732, 741-742 (1982). The Sixth Circuit has declined to choose between the two standards. *Boles* v. *Onton Dock, Inc.*, 659 F.2d 74, 75-76 (1981).

Although this Court has not addressed the issue directly, it has assumed that the arbitrary and capricious standard applies. In *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976), the Court held that an agency's determination not to prepare a "regional" EIS in the absence of a proposal for "regional" action should be upheld "[a]bsent a showing of arbitrary action."

The circuits have recognized that the issue presented by petitioner is of no real consequence. As the Sixth Circuit stated in *Boles* v. *Onton Dock, Inc.*, 659 F.2d 74, 75 (1981), "[n]o matter what standard courts have used, they have looked to see whether the Corps made a reasoned determination." See also *Town of Lower Alloways Creek* v. *Public Service Electric & Gas Co.*, 687 F.2d 732, 742 n.23 (3d Cir. 1982) ("In some instances, * * * the distinction between the two standards tends to blur. Even under the arguably 'lower'[arbitrary and capricious] standard, agencies are not entitled to unbridled discretion in determining whether prepartion of an EIS is necessary.").

Thus, circuits that apply the arbitrary and capricious standard often speak in terms of reasonableness as well. See, *e.g.*, *Quinonez-Lopez* v. *Coco Lagoon Development Corp.*, 733 F.2d 1, 2 (1st Cir. 1984); *Town of Orangetown* v. *Gorsuch*, 718 F.2d 29, 35 (2d Cir. 1983), cert. denied, No. 83-857 (Mar. 19, 1984); *Committee for Auto Responsibility* v. *Solomon*, 603 F.2d 992, 1002 (D.C. Cir. 1979), cert. denied, 445 U.S. 915 (1980). And, on the other side of the coin, circuits that apply the "reasonableness" standard of review are no more likely to overturn an agency decision not to prepare an EIS than are the circuits that employ the arbitrary and capricious test. Those circuits that apply the "reasonableness" standard of review require a plaintiff to raise a substantial environmental issue by showing that the project "will significantly degrade the human environment." *Vieux Carre Property Owners, Residents & Associates, Inc.* v. *Pierce*, 719 F.2d 1272, 1279 (5th Cir. 1983). Accord, *Foundation for North American Wild Sheep* v. *United States Dep't of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982); *Winnebago Tribe of Nebraska* v. *Ray*, 621 F.2d 269, 271 (8th Cir.), cert. denied, 449 U.S. 836 (1980). Such a showing clearly is at least as demanding as one requiring a plaintiff to demonstrate arbitrary and capricious agency action.

It is thus plain that no significant distinction exists between the two standards. Litigants and the courts of appeals have managed to cope with the semantic distinction raised by petitioner for more than a decade, with no apparent effect on the outcome of cases. This Court's intervention is therefore unnecessary.

It is also clear that petitioner would not benefit from the application of a different standard, for she has failed to explain in what way the Corps' decision in this case was somehow unreasonable even though it was not arbitrary and capricious. It is beyond dispute that petitioner opposes the project. She has not, however, pointed to any possible environmental impacts that the Corps failed to consider. Petitioner merely disagrees with, and urged the courts below to disagree with, the Corps' conclusion that the project would not have a significant effect on the human environment. That sort of second-guessing runs afoul of this Court's admonition in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976): "Neither [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions."

2. a. Petitioner also criticizes (Pet. 40-46) the court of appeals for applying the arbitrary and capricious standard of review to the Corps' consideration of alternatives to the project. Petitioner relies upon an incorrect reading of this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), to argue that a reasonableness test governs judicial review of an agency's consideration of alternatives. There is no such holding in *Vermont Yankee*. Instead, the Court there stated, in reversing the court of appeals' determination that the agency's rejection of an alternative had been arbitrary and capricious (435 U.S. at 554 (emphasis added)):

> In sum, to characterize the actions of the Commission as "*arbitrary or capricious*" in light of the facts then available to it as described at length above, is to deprive those words of any meaning.

Quite clearly, this was not a rejection of the arbitrary and capricious standard of review.

In any event, petitioner has once again failed to demonstrate how application of a different standard would have produced a different result in this case. It is undisputed that a great demand for marina spaces exists in the Norfolk area. A smaller project — the alternative that petitioner claims was ignored — clearly would not fill that need.[6] Indeed, as the Corps noted in its EA, the probable result of a smaller marina in one location would be more marinas elsewhere in the area. See note 6, *supra*. In these circumstances, it was neither arbitrary and capricious nor unreasonable for the Corps to rule out the option of a smaller marina.

This is particularly so because the Corps' role in this project was simply to pass on the permit application; consideration of a smaller marina would be pointless if, as here, the developer had expressed no interest in that "alternative." As the court recognized in *Beaufort-Jasper County Water Authority* v. *Corps of Engineers*, No. 81-984-8 (D.S.C. May 10, 1984), *reprinted in* 14 Envtl. L. Rep. (Envtl. L. Inst.) 20732, 20735 (Oct. 1984):

> Since the project involved was essentially private, the site selection, financing, design, construction and operation of the facility were all matters within the

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[6]It should be noted that the Corps' EA did not totally ignore the option of a smaller marina. See pages 2-3, *supra*; C.A. App. 124. As there explained, the Corps reasoned that, in light of the great demand for additional marina slips, one large marina in the proposed location was environmentally preferable to several smaller marinas in areas likely to be more environmentally sensitive.

> discretion of the applicant. Therefore, the only reasonable alternatives were to issue the permit, issue the permit with conditions, and deny the permit.

On the record in this case, therefore, it is clear that formal consideration of a smaller marina would have served no purpose other than to waste time and resources. The standard of review is irrelevant to that conclusion.

b. Whatever the standard of review, the cases cited by petitioner do not support her contention that the Corps erred in failing to consider at length the alternative of a smaller marina. Only two cases cited by petitioner discuss the need to consider alternatives when a project is found *not* to have a significant effect on the human environment, and neither supports petitioner's claim of error. In *City of New York* v. *United States Dep't of Transportation,* 715 F.2d 732 (2d Cir. 1983), cert. denied, No. 83-770 (Feb. 27, 1984), the Department of Transportation had concluded that no EIS was required for the transportation of radioactive materials by highway. The court of appeals upheld the agency's brief consideration of alternatives, noting that the finding of no significant impact "substantially diminishes the claim that the Department acted arbitrarily in declining to consider barging as a national alternative" (715 F.2d at 744).[7] Accord, *Beaufort-Jasper County Water Authority,*

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[7]The court felt bound by prior circuit precedent (*Hanly* v. *Kleindienst,* 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973), to hold that some consideration of alternatives was required even though the project would have no significant impacts. Nevertheless, the court stated (715 F.2d at 744):

> Though we have required an agency to give some consideration to alternatives even though preparation of an EIS is not required, * * * it remains something of an anomaly to insist that an agency assess alternatives for an action that it has determined will not have a "significant" effect upon the environment. * * * But even accepting the teaching of *Hanly,* as we must, we are of the view that an agency's finding of no significant impact, if otherwise valid, permits the agency to consider a narrower range of alternatives than it might be obliged to assess before undertaking action that would significantly affect the environment.

supra. Most of the other cases cited by petitioner (Pet. 47-50) deal with an agency's obligation to discuss alternatives in an EIS, after the agency has determined that the proposed action *will* have a significant effect on the human environment. Those cases have no bearing on the present case, and they furnish no basis for further review.

3. Finally, petitioner argues (Pet. 52-56) that the Corps had a duty to verify the developer's projection of an 18% interest rate for financing the marina project.[8] Petitioner's contention appears to be that evaluation of the project using a lower interest rate would have led to the conclusion that a smaller marina was economically feasible. This fact-bound dispute does not merit further review. Furthermore, as the court of appeals recognized (Pet. App. 14a-15a), the 18% interest rate simply was not a major factor in the decisionmaking process. It was the great need for slips, not the interest rate, that led the developer to propose a 298-slip marina (*id.* at 15a). The Corps also cited the need for additional slips, not the projected interest rate, as the justification for the project (C.A. App. 124). Petitioner has failed utterly to demonstrate that the Corps would have reached a different result had it considered a lower interest rate.

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[8]It should be noted that this rate was given only as a projection; it was never stated as a fact. See C.A. App. 89. Moreover, as the district court noted, petitioner failed to offer any evidence bearing on interest rates in the administrative proceedings (Pet. App. 46a).

CONCLUSION

The petition for a writ of certiorari should be denied.[9]

Respectfully submitted.

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MARCH 1985

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[9]The non-federal respondents have requested us to state that they wish to adopt this brief as their response to the petition.

DOJ-1985-03

(3)

No. 84-1062

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NANCY H. GEE,

Petitioner,

v.

COLONEL CLAUDE D. BOYD, III, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY AND SUPPLEMENTAL BRIEF OF PETITIONER

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EDITOR'S NOTE

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ARGUMENT

1. The Recent ABA Draft Resolution and Report on This Subject Demonstrates the Importance of the Scope-of-Review Questions.

Petitioner's contention that there is a great need for clarification of the

scope and standard of review in NEPA cases involving negative determinations (i.e., decisions not to prepare an EIS) is underscored by the recent release by the Committee on Judicial Review of the American Bar Association's Section of Administrative Law of its preliminary draft of a resolution and report on scope of review standards under 5 U.S.C. §706. Levin, "Federal Scope-of-Review Standards: A Preliminary Restatement," 37 Adm. L. Rev. 95 (1985)(containing the text of the draft resolution and report). This information was not available to the Petitioner at the time the Petition was filed.

The draft report effectively refutes any suggestion that the first question presented in the Petition is merely academic or semantic. See, particularly, id. at 107-09, 120-21. The resolution of

the issue posed will have a considerable practical effect on the way agencies and reviewing courts function in NEPA cases in the future.[1/]

The draft report also recognizes the primary role of the courts in the interpretation of statutes and other provisions of law. Id. at 120. A blanket application of the arbitrary and capricious test to a determination not to prepare an EIS would be inappropriate where, as here, such a determination involves questions of law or a mixed question of law and fact. See Petition

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1/ The general confusion over, and dissatisfaction with, judicial review standards have also prompted recent efforts in Congress to revise federal scope-of-review criteria. See, e.g., Regulatory Procedures Act of 1981: Hearings on H.R. 746 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 97th Cong., 1st Sess. (1981); Senate Report No. 284 on S. 1080, 97th Cong., 1st Sess. (1981).

35-39. At the very least, the reasonableness standard must be applied to the agency's interpretations of law.

Here, the statutory language requiring interpretation included the phrase "significantly affecting the quality of the human environment...." 42 U.S.C. §4332(2)(C). In particular, most of the argument below was devoted to the proper construction of the terms "affecting" and "human environment."

Despite the obvious definitional and statutory construction issues involved in the District Engineer's decision not to prepare an EIS, the Court of Appeals concluded that the only issue is merely "whether the finding of no significant impact is unsupported by the evidence." Petition 9a. That conclusion was plainly wrong. The Petitioner has demonstrated how the outcome would have been different

had the reasonableness standard been applied. Petition 35-39.[2/]

Federal Respondent argues for the first time in its Brief in Opposition (Br. 6-7) that the first issue presented by Petitioner is of no real consequence because the circuits reach the same conclusion in cases involving negative determinations regardless of the standard applied. If that is the situation, the federal courts are wasting considerable time agonizing over, analyzing and describing the differences between the arbitrary and capricious standard and the reasonableness standard in NEPA cases.

2/ Respondent now contends that Petitioner failed to meet the threshold test of materiality applied in NEPA cases. Br. 8. To the contrary, Petitioner and her experts raised several environmental concerns warranting preparation of an EIS which were ignored by the Respondent. See, e.g., C.A. App. 179-91, 202-06.

That alone is reason to grant the Petition.

2. Federal Respondent Raises the Erroneous Notion That Alternatives Need Not Be Considered Once a Decision Not to Prepare an EIS Is Made.

Federal Respondent suggests again for the first time in its Brief in Opposition (Br. 10-11), that the Corps is under no duty to consider alternatives once a finding of no significant impact is made. Such an argument ignores §102(2)(E) of NEPA and the relevant Corps' regulations. 33 CFR §230.5(e) and Part 230, Appendix B, ¶8a. See Petition 54a and Appendix to this Reply Brief.

It is difficult to conceive of a more narrow range of reasonable alternatives than that suggested by Petitioner. The alternative pressed by Petitioner was a smaller marina. The size of the marina

as approved was never justified by any quantitative date regarding demand for slips, but only by conclusory references to "the great need" and a financial analysis showing a breakeven point at 260 slips based on 18% financing. Petitioner demonstrated that a lower rate of 10.1% was the actual rate.3/ Discussion of the number of slips occurred only in the

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3/ Respondent erroneously states that Petitioner failed to offer any evidence bearing on interest rates in the administrative proceedings (Br. 11 n.8). Petitioner's husband submitted comment to the District Engineer demonstrating the actual rate of 10.125%. C.A. App. 202. Petitioner also submitted evidence to the district court showing that the developer considered lower rates prior to the issuance of the permit. C.A. App. 27-40.

Respondent also erroneously suggests (Br. 3-4 n.4) that there is no record support for Petitioner's assertion (Petition 13-14) that 47 property owners submitted petitions to the District Engineer objecting to the permit. This has never been an issue, but support can be found in the Administrative Record (Tab 44) in the form of copies of the actual petitions.

context of the project's financial feasibility, not the need for slips.

4. No Effort Was Made to Verify Any of the Suggested Bases for the Project's Size.

Respondent's erroneous assumption that Petitioner failed to offer evidence bearing on interest rates (Br. 11 n.8) has been noted. See n.2, supra. That error colors his argument. Although Respondent repeatedly argues in his Brief in Opposition that "the great need for slips" was the only factor that led the developer to propose a 298-slip marina (Br. 5, 9, 11), that contention is at odds with the very language of the permit application and the Final EA. See pertinent language quoted at Petition 5-7. The District Engineer clearly relied on economic feasibility and "the great need," but made no effort at all to

verify either basis for issuing a permit for a 298-slip marina. This absence of verification required by both NEPA and applicable regulations is fatal to the action challenged by Petitioner.

CONCLUSION

NEPA cases continue to impose a heavy load on the federal courts, particularly those raising the very questions presented here for review. Resolution of those questions will contribute substantially to judicial economy. As noted in the Petition, the unusual circumstance that these issues are found together here

provides an additional, special and important reason for review.

Respectfully submitted,

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APPENDIX

33 CFR §230.5 Policy.

The U.S. Army Corps of Engineers, under the direction and supervision of the Secretary of the Army, will continue to implement vigorously the National Environmental Policy Act of 1969, applicable environmental quality statutes and the regulations of the Council on Environmental Quality in carrying out its Civil Works mission consistent with statutory responsibilities and other essential considerations of national policy. From the initiation of project planning through design, construction and operation and maintenance, and in developing decisions in the regulation of activities affecting waters of the United States, the goals and policies of NEPA will be considered to insure decisions in the public interest. To this end, the Corps will: . . . (e) Explore, study and analyze all reasonable alternatives, including nonstructural alternatives, with a view to selecting a plan or approving an action that can best satisfy specified needs.

SUPREME COURT OF THE UNITED STATES

NANCY H. GEE *v.* CLAUDE D. BOYD, III, ETC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1062. Decided April 22, 1985

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

In 1982, the City of Norfolk sought permission from the Army Corps of Engineers to construct a 298-slip marina at the site of an abandoned ferry and near two existing marinas. The Corps issued an "environmental assessment"[1] concerning the project, which concluded that the socioeconomic benefits of the project outweighed its likely adverse impact on the aquatic ecosystem. The Corps further concluded that the project would not "significantly affect . . . the quality of the human environment," see 42 U. S. C. § 4332(2)(C), thereby making unnecessary the preparation of an environmental impact statement (EIS). On the same day, the Corps issued a permit to the City clearing the project.

Petitioner, a partner in a venture that owns property near the site of the proposed marina, subsequently filed suit, challenging, *inter alia*, the Corps' failure to prepare an EIS.[2] The District Court granted summary judgment to respond-

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[1] An "environmental assessment" is a brief document that the Army Corps of Engineers prepares in order to determine whether a proposed action will have a significant effect on the human envirnoment. If such an effect is anticipated, a more detailed "environmental impact statement" is required under 42 U. S. C. § 4332(2)(C). See App. to Petition at 15a–16a, n. 1.

[2] Petitioner also contended that respondents failed to consider all reasonable alternatives and mitigation measures as required by 42 U. S. C. § 4332(2)(E), and that they had failed to verify certain financial data submitted by the applicant. These claims were rejected by the lower courts.

ents and denied petitioner's cross-motion for summary judgment. On appeal, the Court of Appeals for the Fourth Circuit, like the District Court, employed an "arbitrary and capricious" standard in reviewing the agency's determination that the proposed marina would have no significant effect on the environment. App. to Petition 8a. See also *Webb* v. *Gorsuch*, 699 F. 2d 157, 160 (CA4 1983); *Providence Road Community Association* v. *EPA*, 683 F. 2d 80, 82 (CA4 1982). The court held that neither this finding, nor the agency's failure to consider the effect of possible future marinas on the environment, was arbitrary or capricious.

The decision below is the most recent in a long line of cases that have used divergent standards of review to assess an agency's failure to prepare an EIS. The First, Second, and Seventh Circuits, like the Fourth, will reverse such agency action only if it is arbitrary or capricious. See *Grazing Fields Farm* v. *Goldschmidt*, 626 F. 2d 1068, 1072 (CA1 1980); *Hanley* v. *Kliendienst*, 471 F. 2d 823, 828–829 (CA2 1972), cert. denied, 412 U. S. 908 (1973); *Nucleus of Chicago Homeowners Association* v. *Lynn*, 524 F. 2d 225, 229 (CA7 1975), cert. denied, 424 U. S. 967 (1976). Four other circuits have employed a "reasonableness" standard of review. See *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 466 (CA5 1973); *Winnebago Tribe of Nebraska* v. *Ray*, 621 F. 2d 269, 271 (CA8), cert. denied, 449 U. S. 836 (1980); *Foundation for North American Wild Sheep* v. *United States Department of Agriculture*, 681 F. 2d 1172, 1177–1178 (CA9 1982); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F. 2d 1244, 1248–1249 (CA10 1973).[3] The Third Circuit has assumed, without deciding, that a "reasonableness" standard is appropriate, *Township of Lower Alloways Creek* v. *Public Service Electric & Gas Co.*, 687 F. 2d 732, 741–742 (1982), and the Sixth Circuit has similarly declined to choose between the two standards. *Boles* v. *Onton Dock, Inc.*, 659 F. 2d 74, 75 (1981). The Court of Appeals for the District of Columbia has developed a four-part test to determine whether the agency action is arbitrary and capricious. *Sierra Club* v. *Peterson*, 717 F. 2d 1409 (1983).[4]

[3]The Eleventh Circuit has adopted as binding decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner* v. *City of Prichard*, 661 F. 2d 1206 (CA11 1981) (en banc). Therefore, the Eleventh Circuit would presumably employ a "reasonableness" standard in reviewing the failure to prepare an EIS statement.

Courts that have applied a reasonableness standard have generally placed an initial burden on the plaintiff of raising a "substantial environmental issue concerning the proposed project," after which the burden shifts to the agency to demonstrate the reasonableness of its negative determination. See *Winnebago Tribe of Nebraska* v. *Ray*, 621 F. 2d 269, 271 (CA8), cert. denied, 449 U. S. 836 (1980). See also *Foundation for North American Wild Sheep* v. *United States Department of Agriculture*, 681 F. 2d 1172, 1178 (CA9 1982); *Pokorny* v. *Cosle*, 464 F. Supp. 1273, 1276 (D Neb. 1979).

[4]The test used by the District of Columbia Circuit in scrutinizing an agency's finding of "no significant impact" is:

"(1) whether the agency took a 'hard look' at the problem;
(2) whether the agency identified the relevant areas of environmental concern;
(3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and
(4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum." 717 F. 2d, at 1413.

This conflict is not merely semantic or academic. Certainly, there are individual cases in which application of one standard rather than the other makes no difference. But the lower courts that have wrestled with the question of what rule to adopt clearly have not viewed the issue as one that might be settled by the flip of a coin. Courts that have chosen the "reasonableness" standard have relied on the importance of "the basic jurisdictional-type conclusion involved,"[5] or on the "mandatory nature" of the statute's language.[6] In

[5]*Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 466 (CA5 1873).

[6]*Foundation for North American Wild Sheep* v. *United States Department of Agriculture*, 681F. 2d 1172, 1177 n. 24; see also *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F. 2d 1244, 1249 (CA10 1973).

settling on this more stringent rule, the Court of Appeals for the Fifth Circuit expressed the concern that "[t]he spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect environment were too well shielded from impartial review." *Save Our Ten Acres, supra*, 472 F. 2d, at 466. In contrast, courts adopting the "arbitrary and capricious" test have emphasized that the decision not to prepare an EIS is one committed to the agency's discretion[7], and that application of a more deferential standard "permits the agencies to have some leeway in applying the law to factual contexts in which they possess expertise."[8] The Court of Appeals did not state in this case that it would have reached the same result under a "reasonableness" standard,[9] and it is not for us to say what conclusions it might have drawn had it applied different considerations to these facts.

The lower courts have long been in disarray on what standard of review to apply to an agency's decision not to undertake an EIS. I would grant certiorari to end this confusion.

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[7] *Providence Road Community Association* v. *Environmental Protection Agency*, 683 F. 2d 80, 82 (CA4 1982).

[8] *Hanly* v. *Kliendienst*, 471 F. 2d 823, 829–830 (CA2 1972), cert. denied, 412 U. S. 908 (1973). See also *First National Bank of Chicago* v. *Richardson*, 484 F. 2d 1369, 1381 (CA7 1973).

[9] Cf. *Providence Road Community Association*, *supra*, 683 F. 2d, at 82, n. 3.